MOTION FILED

NOV 1 0 2003

No. 03-531

In the

Supreme Court of the United States

YARDARM RESTAURANT, INC.,

Petitioner,

v.

THE CITY OF POMPANO BEACH,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida for the Fourth District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

ALICIA L. RAUSE
Of Counsel
Pacific Legal Foundation
1320 South Dixie Highway
Suite 1105
Coral Gables, Florida 33146
Telephone: (305) 667-1677
Facsimile: (305) 667-7773

JAMES S. BURLING
Counsel of Record
EMMA T. SUAREZ PAWLICKI
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae Pacific Legal Foundation

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation (PLF) respectfully requests leave of the Court to file this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent for participation in this case was granted by counsel of record for Petitioner. Consent was withheld by Respondent City of Pompano Beach.

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is the largest and most experienced nonprofit, public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF attorneys have appeared before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Recently, PLF attorneys presented this Court with arguments regarding how the Constitution and this Court's precedents establish that the ownership of land is a property right protected by due process. *See City of Cuyahoga Falls v. Buckeye*

---

[1] Pursuant to Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Community Hope Foundation, 538 U.S. 188, 123 S. Ct. 1389 (2003). PLF's concerns extend to a governmental entity's abuse of the constitutional rights of its citizens and disregard for the substantive due process and property rights due to all citizens of the United States. Amicus's interest in the outcome of this lawsuit is directly tied to its members' private property rights and its members' right to be treated fairly and equitably by our governing institutions.

For all the foregoing reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: November, 2003.

Respectfully submitted,

ALICIA L. RAUSE
Of Counsel
Pacific Legal Foundation
1320 South Dixie Highway
Suite 1105
Coral Gables, Florida 33146
Telephone: (305) 667-1677
Facsimile: (305) 667-7773

JAMES S. BURLING
Counsel of Record
EMMA T. SUAREZ PAWLICKI
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

1. In determining whether there is a denial of substantive due process of law by a local government, does it make any difference whether the property rights that were violated arose directly from the Constitution or were created by state law?

2. Must Florida comply with this Court's repeated holding that a regulatory taking of private property occurs when government action fails to substantially advance a legitimate state interest?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. YARDARM HAD A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT TO MAKE REASONABLE USE OF ITS LAND, WHICH REQUIRED THE FLORIDA COURTS TO PERFORM A SUBSTANTIVE DUE PROCESS REVIEW OF THE CLAIMS 3

II. FLORIDA TAKINGS LAW IS IN CONFLICT WITH THE LAW OF THIS COURT AND OTHER STATE COURTS AND HAS RESULTED IN A DENIAL OF CONSTITUTIONAL RIGHTS TO THE CITIZENS OF FLORIDA 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 2, 7-8

Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068 (8th Cir. 1997) 5

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 3-4, 5

City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188, 123 S. Ct. 1389 (2003) 3

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 8

City of Pompano Beach v. Yardarm Restaurant, 834 So. 2d 861 (Fla. Dist. Ct. App. 2002) 8-9

DeBlasio v. Zoning Board of Adjustment for Township of West Anwell, 53 F.3d 592 (3d Cir. 1995) 4

Department of Transportation v. Weisenfeld, 617 So. 2d 1071 (Fla. Dist. Ct. App. 1993) 9

Dolan v. City of Tigard, 512 U.S. 374 (1994) 8

Estate of Friedman v. Pierce County, 768 P.2d 462 (Wash. 1989) 10

Gardner v. Baltimore Mayor and City Council, 969 F.2d 63 (4th Cir. 1992) 5

George Washington Univ. v. District of Columbia, 318 F.3d 203 (D.C. Cir. 2003) 5

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 8

TABLE OF AUTHORITIES—Continued

Page

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 8

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995)..... 1

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 6, 8

OMYA, Inc. v. Town of Middlebury, 758 A.2d 777 (Vt. 2000) 10

Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. Dist. Ct. App.), *review denied*, 591 So. 2d 183 (Fla. 1991) 10

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 7

Perry v. Sindermann, 408 U.S. 593 (1972) 4-5

River Park, Inc. v. City of Highland Park, 23 F.3d 164 (7th Cir. 1994) 4, 7

RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (2d Cir. 1989) 5

State ex rel. Shemo v. City of Mayfield Heights, 765 N.E.2d 345 (Ohio 2002) 10

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 8

Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp., 640 So. 2d 54 (Fla. 1994) 9-10

Triomphe Investors v. City of Northwood, 49 F.3d 198 (6th Cir. 1995) 5

TABLE OF AUTHORITIES—Continued

Page

United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003) 4

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 8

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 4

Washington ex. rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) 6

Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829) 6-7

Yee v. City of Escondido, 503 U.S. 519 (1992) 8

Constitution

U.S. CONST. amend. V 1

U.S. CONST. amend. XIV 6

Miscellaneous

Reich, Charles, *The New Property*, 73 Yale L.J. 733 (1964) 5

Mandelker, Daniel R., *New Property Rights Under the Taking Clause*, 81 Marq. L. Rev. 9 (1997) 5

INTRODUCTION

The Florida courts are denying the citizens of Florida the constitutional property rights afforded to all of the citizens of this country under the Fifth Amendment to the United States Constitution.[1] Yardarm Restaurant (Petitioner) was driven out of business because of the hostile actions of the City of Pompano Beach (Respondent) (Petition for a Writ of Certiorari at 4). Respondent's abuse of Petitioner's substantive due process and basic constitutional property rights have gone without recourse, however, because the Florida courts have chosen to disregard the law as handed down by this Court, even when those state cases required an application of federal law.

SUMMARY OF ARGUMENT

This Court and several lower federal courts have held that due process protection attaches to property ownership because landowners have a constitutionally protected interest in using their property. Some courts, however, require that an additional "entitlement" to a particular use of property be established before considering a due process claim. These courts, which include the Eleventh Circuit Court,[2] fail to recognize a very important distinction—circumstances where due process rights attach because a real property interest is involved are different than circumstances where the underlying rights arise out of governmental benefits, where there is no inherent right to the benefit in the first place. The court below in this case followed the unfortunate precedent set by the Eleventh Circuit on the issue of "entitlement," instead of following the holdings of this

---

[1] The Takings Clause of the Fifth Amendment of the United States Constitution provides: "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

[2] *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied, sub nom. McKinney v. Osceola County Bd. Of County Comm'rs*, 513 U.S. 1110 (1995)

Court and several other federal courts. There is a rift developing between the federal courts of this nation in their interpretations of due process protection, and that confusion is filtering down to the lower state courts. The result is a body of law that is confused and conflicted. The Court must hold that when traditional property rights identified in the Due Process Clause are at issue, there can be no "entitlement" requirement for due process protections to attach. Some courts have understood this, but unfortunately others have not. This case cleanly presents the issue for this Court to resolve the conflict in the state and lower federal courts.

The denial of property rights to the citizens of Florida is also evident in the decisions handed down by the Florida Courts of Appeal, as well as the Florida Supreme Court, all of which refuse to recognize the significance of the word "or" in the takings test announced by this Court in *Agins v. City of Tiburon*[3] and subsequent cases. Instead, they have continued to misapply that test by holding that a regulatory act that fails to substantially advance a legitimate government interest cannot be a taking unless it also simultaneously denies economically viable use. This repeated holding of the Florida courts goes against a clear interpretation set forth by this Court of the *Agins* takings test, which states that **either** the first prong of the test, substantial advancement, **or** the second prong, denial of economically viable use, must be met for a taking to occur. The Petitioner in this case was denied its federal Takings Clause claim because the Florida courts, including the court below, refuse to correctly apply the disjunctive *Agins* test as repeatedly upheld by this Court. The Court must decide this case because it is the latest and most egregious in a long line of Florida cases.

---

[3] 447 U.S. 255 (1980).

ARGUMENT

I

YARDARM HAD A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT TO MAKE REASONABLE USE OF ITS LAND, WHICH REQUIRED THE FLORIDA COURTS TO PERFORM A SUBSTANTIVE DUE PROCESS REVIEW OF THE CLAIMS

Yardarm argues that the City's actions violated its substantive due process rights under the Due Process Clause, and challenges the position taken by Florida courts that constitutionally protected property rights receive due process protection only if the owner also has a vested right to develop the property. Because the Due Process Clause guards against arbitrary decisions by any government entity that interfere with fundamental constitutional guarantees against deprivations of life, liberty, or property, it does not matter whether an owner has a vested right to use the property in a particular manner. The protections of the Due Process Clause attach not only after a landowner has obtained a vested use right, but also whenever government acts in a manner violative of the Due Process Clause *prior* to the culmination of any vesting process. Otherwise, landowners on their way to obtaining a vested right can be arbitrarily stripped of their right to use property without recourse. Since Petitioner had an ownership interest in the property involved in the litigation, it had a right to make use of the property—a right protected by the Due Process Clause.

A constitutionally protected property interest is an essential element of a claim for violation of due process rights. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972); *see also City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389, 1396 (2003) (considering, but not finding it necessary to decide whether respondents possessed a property interest in the timely issuance of a building permit). Some courts have held that property

ownership alone is sufficient to meet the "property interest" prong of the due process constitutional analysis. "[O]ne would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership." *DeBlasio v. Zoning Board of Adjustment for Township of West Anwell*, 53 F.3d 592, 601 (3d Cir. 1995) (overruled on other grounds by *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (due process protection attaches to property ownership because landowners have a constitutionally protected interest in using their property); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994); (*DeBlasio* "is only controlling as a land-use regulation case that established a fundamental property interest protected by substantive due process where a governmental decision restricts or regulates a landowner's use and enjoyment of his/her property.").

In *Roth*, this Court looked to whether Roth had a "legitimate claim of entitlement" to a nontenured teaching position at a state-run institution, and considered whether to broaden the class of claims that come under due process protection. *Roth*, 408 U.S. at 577. Thus, in *Roth*, this Court was concerned with public benefits ("new property") and not with traditional forms of property. *Roth* also states that property rights are not created by the Constitution, but are created and defined by an independent source, such as state law. 408 U.S. at 577.

In *Roth* and its companion case *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), this Court expanded due process protection to cover more than the traditional forms of property (e.g., ownership of real estate, chattels, or money). This Court recognized other, new forms of protected property, arising from public benefits created by a state. *Roth*, 408 U.S. at 571-72 ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual

ownership of real estate, chattels, or money."); *Perry*, 408 U.S. 593 at 601 (" '[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms."). *Perry*, 408 U.S. 593 at 601. *See also* Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 Marq. L. Rev. 9 (1997); Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964) (advocates for a theory of recognition and protection of new property rights). Thus, this Court has repeatedly reviewed due process claims without requiring the owner to first perfect a statutory entitlement. *Roth* also affirmed the fundamental principle that ownership of property is sufficient to establish a substantive due process claim. *Roth*, 408 U.S. at 571-72. Unfortunately, many circuits have begun to misapply the "entitlement approach" enunciated in *Roth* and have read *Roth* to require a "legitimate claim of entitlement" to a particular use of property. *See, e.g.*, *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63, 68-69 (4th Cir. 1992); *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202-03 (6th Cir. 1995); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989). In other words, because *Roth* required entitlement or vesting of the new property right for due process to attach, these courts mistakenly demand that owners of *real* property have some type of a vested development entitlement before they can assert a due process claim. Those courts, like the Florida court in this case, do not look to ownership of property standing alone as being an adequate interest for due process to apply, but have instead "focused on the structure of the land-use regulatory process . . . looking to the degree of discretion to be exercised by state officials in granting or withholding the relevant permission." *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 207 (D.C. Cir. 2003) (citation omitted). These courts want to see that the landowner has an entitlement to a permit before they will entertain the question of whether the denial of a permit application might implicate the

Due Process Clause. *Roth* and *Perry* establish an "entitlement approach" that properly is applied to cases seeking a property interest in valuable government benefits. The "entitlement approach" has no application when a court is asked to decide whether land use decisions involve illegitimate government action. Thus, it cannot not guide the analysis regarding the appropriate fundamental interest that merits due process protection when the interest in question flows from property ownership. The court below made an error of constitutional magnitude by enlisting that incorrect approach.

Unlike a professor seeking continued employment, property owners such as Petitioner are not claiming the right to a government-established benefit when seeking to make use of their property. *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987) ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' "). Any analysis that implicitly or explicitly requires an "additional interest" or entitlement beyond property ownership to establish a due process claim goes contrary to this Court's expansion of the definition of property interest in *Roth*. It also results in the denial of due process protection for the property interests specifically mentioned in the Due Process Clause of the United States Constitution as entitled to protection. U.S. CONST. amend. XIV.

One of the defining essential rights included in property ownership is the right of the owner to use his land. *See Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (In deciding a due process challenge a land use regulation the Court held: "The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution."). As early as 1829 this Court stressed "the right of the citizens to the free enjoyment of their property lawfully acquired." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627,

657-58 (1829). Similarly, Judge Easterbrook, writing for the Seventh Circuit Court in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), explained that, while land use regulations may put legal restrictions on the use of the property, the property owner retains a constitutionally protected interest in being able to use his property. *Id.* at 166. Otherwise a single local ordinance providing that "'we may put your land in any zone we want, for any reason we like' would abolish all property rights in land overnight. The due process clause... [is] made of sterner stuff." *River Park, Inc. v. City of Highland Park*, 23 F.3d at 166. And while a government may seek to restrict the right of the owner to use property in a particular way, the regulatory process must not be confused with the property interest at stake. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

In this case, Petitioner has a constitutionally protected property interest that gives rise to Due Process Clause protections, solidly anchored in Petitioner's ownership of the property at issue in the lawsuit. This property is, in and of itself, a protected property interest that allows Yardarm to challenge arbitrary and capricious government actions connected with the regulatory process. This Court should grant the petition to ensure that the Due Process Clause is in place to protect property owners from the arbitrary actions of any governmental entity, and that ownership in property is a sufficient interest meriting Due Process Clause protections.

II

FLORIDA TAKINGS LAW IS IN CONFLICT WITH THE LAW OF THIS COURT AND OTHER STATE COURTS AND HAS RESULTED IN A DENIAL OF CONSTITUTIONAL RIGHTS TO CITIZENS OF FLORIDA

In the years since this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255, the "two-pronged takings test"

enunciated by the Court has been repeatedly cited and accepted as the law of the land with regard to regulatory takings. As this Court held in *Agins*, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (citations omitted). Since this Court handed down the *Agins* decision, it has, on several occasions, reiterated the two-pronged takings test in cases involving a wide variety of both facial and as-applied challenges to legislative enactments and regulatory actions. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commission*, 483 U.S. at 834; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). Not only has this Court reiterated the *Agins* takings test on numerous occasions, but it has consistently held that satisfaction of the first of the prongs, failure to substantially advance a legitimate state interest, will give rise to a taking. *See id.*

Florida has ignored this Court's clear interpretation of the takings law and, in the process, has denied essential property rights to its citizens, including this Petitioner.

In this case, the court below *twice* held that a taking had not occurred in Yardarm's case, despite citing to the trial court's findings that "the City engaged in unreasonable, protracted litigation; repeatedly ignored court orders . . . ; and engaged in stonewalling tactics to block the Yardarm project." *City of Pompano Beach v. Yardarm Restaurant*, 834 So. 2d 861, 868 (Fla. Dist. Ct. App. 2002). The testimony of a city

commissioner clearly states that these commissioners had an " 'unstated policy to kill the Yardarm project.' " *Id.* at 869. Despite the largely uncontested evidence that the actions of the City were not for the purpose of advancing a legitimate state interest, but were instead geared towards satisfying a few influential individuals who wanted to exert their control over the Yardarm project, the Florida Court of Appeal found no taking under the Florida Constitution. *Id.* at 865. It based its holding on the erroneous premise that in addition to a regulatory act's failure to substantially advance a legitimate governmental interest, it must also simultaneously deny economically viable use for there to be a taking. *Id.* at 865.

After denying relief of the takings claim under Florida state law, the court below made a second, more egregious error. It went on to hold that the state and federal takings claims of the Petitioner were 'identical" and, as such, the federal claim should similarly fail under the United States Constitution. *Id.* at 865. Not only was this an incorrect application of federal law in light of *Agins* and other decisions by this Court, but in holding that the federal takings claim was precluded by the doctrine of res judicata, *id.* at 865, the court incorrectly asserted that the elements of a takings claim are identical under Florida and federal law. In fact, the two claims are anything but identical, and the Florida courts' treatment as such has resulted in a serious misapplication of federal law.

Unfortunately, the departure of the court below from the opinions of this and other courts is not an aberration of this case; it is a consistent theme in Florida case law. *See, e.g.*, *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994); *Department of Transportation v. Weisenfeld*, 617 So. 2d 1071, 1072-73 (Fla. Dist. Ct. App. 1993). Notwithstanding this Court's clear explanation of the disjunctive nature of the *Agins* test, the Florida courts have failed to take heed, taking the position instead that the second prong, a denial of economically viable

use of the land, must be met in every case before a taking can occur. *Tampa-Hillsborough County Expressway Authority*, 640 So. 2d at 58. In *Tampa-Hillsborough*, a case where a regulation was found not to advance a legitimate state interest, the court held that "[a] taking occurs where regulation denies substantially all economically beneficial or productive use of land." *Id.* This ruling deprived Florida property owners of the ability to assert a takings claim solely on the basis that the regulation failed to substantially advance a legitimate state interest. In the same opinion, the Florida Supreme Court acknowledged and disapproved of the lower court's holding in *Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d 790 (Fla. Dist. Ct. App.), *review denied*, 591 So. 2d 183 (Fla. 1991). In that case, the Florida Court of Appeal reiterated this Court's holding in *Agins* when it held "[a] regulation effects a taking if it does not substantially advance a legitimate state interest *or* if the regulation denies an owner economically viable use of his land." *Id.* at 792. In disapproving of this decision, the Florida Supreme Court not only failed to cite *Agins* or acknowledge the significance of the disjunctive *Agins* takings test at all, but it rejected the one decision that did cite to that test.

On the other hand, several state courts other than Florida have recognized that where takings claims are made, this Court's *Agins* test applies, and has a disjunctive quality which provides that the satisfaction of either prong will effect a taking. *See, e.g., State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 350-51 (Ohio 2002) (stating explicitly that the *Agins* test is disjunctive when applied to situations where a takings claim is made); *OMYA, Inc. v. Town of Middlebury*, 758 A.2d 777, 780 (Vt. 2000) (using the *Agins* test as a disjunction); *Estate of Friedman v. Pierce County*, 768 P.2d 462, 467 (Wash. 1989) (approving the *Agins* rule in its disjunctive form). In *Shemo*, the Ohio Supreme Court, in applying the *Agins* test, found a taking where the owners of a piece of property

demonstrated that the city's zoning of that property as residential did not substantially advance a legitimate state interest. *Shemo*, 765 N.E.2d at 351-52. The breadth of case law handed down by the high courts of several other states has overwhelmingly supported the disjunctive quality of the *Agins* test and the interpretation that a taking will occur with satisfaction of the failure to substantially advance prong standing alone.

The Takings Clause extends to the states as well as the federal government. Unfortunately, the Florida courts have made quite clear in recent decisions, including the court below in the instant case, and the Florida Supreme Court in *Tampa-Hillsborough*, that Florida citizens are not afforded the same protection of property rights under the United States Constitution as the citizens of other states. It is up to this Court to rectify the situation in Florida and restore the property rights of its citizens by reiterating the disjunctive nature of the *Agins* takings test, the significance of the first prong of that test—substantial advancement of a legitimate state interest—and the correct application of this test to a federal takings claim. The Florida courts cannot be allowed to continually misapply federal law, to the detriment of its citizens.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: November, 2003.

Respectfully submitted,

ALICIA L. RAUSE
Of Counsel
Pacific Legal Foundation
1320 South Dixie Highway
Suite 1105
Coral Gables, Florida 33146
Telephone: (305) 667-1677
Facsimile: (305) 667-7773

JAMES S. BURLING
Counsel of Record
EMMA T. SUAREZ PAWLICKI
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae Pacific Legal Foundation